

1 David W. Affeld, State Bar No. 123922  
2 Damion Robinson, State Bar No. 262573  
3 David Markevitch, State Bar No. 256163  
Affeld Grivakes LLP  
3 2049 Century Park East, Ste. 2460  
Los Angeles, CA 90067  
4 Telephone: (310) 979-8700

5 Attorneys for Plaintiff  
6 Michael Zeleny

7

8

9 **UNITED STATES DISTRICT COURT**

10 **NORTHERN DISTRICT OF CALIFORNIA**

11 MICHAEL ZELENY,

12 Plaintiff,

13 vs.

14 GAVIN NEWSOM, *et al.*,

15 Defendants.

Case No. CV 17-7357 RS

Assigned to:  
The Honorable Richard G. Seeborg

**NOTICE OF MOTION AND MOTION  
TO SHORTEN TIME ON MOTION TO  
CONTINUE CERTAIN PRE-TRIAL  
DATES BY 30 DAYS [Local Rule 6-3]**

Action Filed: December 28, 2017  
Trial Date: November 18, 2019

1           **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2           PLEASE TAKE NOTICE THAT Plaintiff Michael Zeleny (“Zeleny”) will and hereby  
3 does move for an order pursuant to Local Rule 6-3 advancing the hearing and shortening time on  
4 his concurrently-filed Joint Motion to Continue Certain Pre-Trial Dates by 30 Days (“Motion to  
5 Continue”). He respectfully requests that the Court hear the Motion to Continue as soon as  
6 practicable.

7           *All parties have agreed to the relief requested in the Motion to Continue.*

8           Zeleny makes this motion pursuant to Local Rule 6-3. *See Creative Science Systems, Inc.*  
9 *v. Forex Markets, LLC*, 2006 WL 3826703, at \*1 (N.D. Cal. Dec. 27, 2016). This motion is  
10 based on this Notice of Motion and Motion, the attached Memorandum of Points and  
11 Authorities, the accompanying Motion to Continue, the Declaration of David Markevitch, the  
12 records and files herein, and such other matters as the Court may consider.

13 Dated: August 31, 2020

Respectfully submitted,

14           s/ David Markevitch  
15           David W. Affeld  
16           Damion D. D. Robinson  
17           David Markevitch  
18           Affeld Grivakes LLP

19           Attorneys for plaintiff Michael Zeleny

20  
21  
22  
23  
24  
25  
26  
27  
28

1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2                   **I.        INTRODUCTION**

3                   On June 19, 2020, the Parties stipulated to a modified pre-trial schedule due to the  
4 COVID-19 pandemic and related business shutdowns, which prevented them from completing  
5 discovery by the then-current deadline. ECF No. 134. Among other things, the Parties set an  
6 Expert Disclosure deadline of September 10, 2020. *Id.* Based on subsequent developments,  
7 including the resurgence of the pandemic and continued business closures across the state, the  
8 scheduled agreed upon in June appears to have been overly optimistic. Markevitch Decl., ¶ 2.

9  
10                  The parties seek a modest, 30-day continuance of discovery deadlines and a  
11 corresponding continuance of the deadline for hearing dispositive motions to February 25, 2021.  
12 This will have no impact on trial as no trial date is set and the parties' next Scheduling  
13 Conference is set for October 29, 2020.

14                  The Parties have completed substantially all discovery, but because of the resurgence of  
15 the pandemic, have been unable to complete a necessary deposition and have a small number of  
16 remaining discovery issues, as follows:

17                  *First*, Plaintiff has been unable to serve and depose Mr. Ivan Toews, the final percipient  
18 witness previously employed by the City of Menlo Park to be deposed. Plaintiff has made  
19 significant efforts to locate and serve Mr. Toews, including hiring an investigator, attempting  
20 service at every potential address, and even speaking with Mr. Toews' relatives. Although  
21 Plaintiff has located Mr. Toews' place of employment, Mr. Toews is not currently going into the  
22 office. While these efforts have been unsuccessful to date, Plaintiff believes that further efforts  
23 are warranted. Markevitch Decl., ¶ 3.a.

24                  *Second*, the deposition of Chief Dave Bertini, individually and as the 30(b)(6)  
25 representative of the City of Menlo Park, was postponed several times due to COVID-19. The  
26 deposition took place remotely (via Zoom) on August 7, 2020. The transcript of Chief Bertini's  
27 deposition has not yet been completed but is anticipated shortly. Markevitch Decl., ¶ 3.b.

28                  *Third*, the Parties currently have a discovery motion pending regarding certain

1 interrogatory responses from Attorney General Xavier Becerra. Markevitch Decl., ¶ 3.c.

2       *As a result of these outstanding discovery matters*, Plaintiff is not able to provide  
 3 complete expert disclosure by September 10, 2020. Among other things, Chief Bertini's  
 4 testimony is essential to expert analysis. Similarly, the City of Menlo Park has reservations  
 5 about its ability to fully assess the need for any rebuttal experts without all fact depositions,  
 6 including of Mr. Toews, having been completed first. Markevitch Decl., ¶ 4.

7       Finally, the postponement of expert discovery deadlines necessitates a corresponding  
 8 postponement of the deadline for hearings on any dispositive motions, as the Parties need *all*  
 9 discovery completed before such motions can be filed. Markevitch Decl., ¶ 5.

10      The parties have agreed upon a schedule to accommodate these needs, and seek the  
 11 Court's guidance as soon as is practicable.

12     **II. EFFORTS TO RESOLVE INFORMALLY**

13      All parties have agreed to the relief requested. Plaintiff submits this application because  
 14 the requested relief impacts the scheduling order and requires Court approval.

15     **III. GOOD CAUSE FOR SHORTENING TIME**

16      Good cause exists to shorten time so that the Motion to Continue can be heard in advance  
 17 of the current discovery cutoff and expert disclosure deadline.

18      The parties will be prejudiced if they do not have the Court's guidance on the remaining  
 19 schedule. The discovery cutoff is currently set for September 3, 2020. Initial expert disclosures  
 20 are due September 10. All remaining pre-trial dates, including dispositive motions and expert  
 21 discovery, are set based on the anticipated close of discovery.

22      Without an order shortening time, the Motion to Continue cannot be heard until October  
 23 8, 2020 [the closest Civil Law & Motion hearing date satisfying the 35-day motion notice  
 24 requirement]. This is after the close of discovery and the current expert disclosure deadline.  
 25 The lack of clarity as to discovery and expert disclosure is substantially prejudicial.

26     //

27     //

28     //

#### **IV. CONCLUSION**

For the foregoing reasons, Plaintiff respectfully requests that the Court grant this motion and shorten time to hear the Motion to Continue.

4 | Dated: August 31, 2020

Respectfully submitted,

s/ David Markevitch

David W. Affeld  
Damion D. D. Robinson  
David Markevitch  
Affeld Grivakes LLP

Attorneys for plaintiff Michael Zeleny

1                   **PROOF OF SERVICE**

2                   I hereby certify that on August 31, 2020, I electronically filed the foregoing document  
3 using the Court's CM/ECF system. I am informed and believe that the CM/ECF system will  
send a notice of electronic filing to the interested parties.

4                   s/ David Markevitch  
5                   David Markevitch

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28